THE COMMERCIAL PRIVILEGES OF THE TREATY OF 1803

IN view of the interest taken in the constitutional questions arising out of the purchase of Louisiana because of their bearing upon our recent acquisitions of territory, it is rather surprising that no one has called attention to the fact that when Louisiana was admitted as a state into the Union, no regard was taken of the conflict of certain provisions of the treaty of 1803 with that clause of the Federal Constitution which specifies that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[1]

The treaty with France which ceded Louisiana to the United States contained the following agreement:

"That the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the port of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise, or other or greater tonnage than that paid by the citizens of the United States."[2]

By the tonnage act of 1790, a duty of only six cents per ton was laid upon ships of the United States, but thirty cents a ton was charged upon vessels built within the United States since 1789, which belonged wholly or in part to subjects of foreign powers, and fifty cents per ton upon all other ships or vessels.[3] An additional duty of ten per cent. was levied by the tariff acts upon all goods imported in ships or vessels not of the United States.[4] It was from these "discriminating duties," as they were called, that the French and Spanish ships were exempted by the treaty for twelve years in the ports of Louisiana.[5]

[1] Article I., Section 9.

[2] Article VII.

[3] Act of July 20, 1790, Chap. 30. *U. S. Stat. at Large*, I. p. 135.

[4] Cf., *e. g.*, Acts of July 4, 1789, Chap. 2; Jan. 29, 1795, Chap. 17, and March 3, 1797, Chap. 10. *U. S. Stat. at Large*, I. pp. 24, 411 and 503.

[5] At different times there were various temporary acts laying additional duties, but the duties noted were practically permanent and are the ones that were always cited in the diplomatic negotiations, of which they were the frequent subject.

The twelve years, during which these privileges were granted, were to "commence three months after the exchange of ratifications, if it shall take place in France, or three months after it shall have been notified at Paris to the French Government, if it shall take place in the United States."[1] The ratifications of the treaty were exchanged in Washington on October 21, 1803, and this fact was announced in *Le Moniteur* of December 21 of the same year. Even if this be not the exact date of the formal notification to France, it is evident that by the terms of the treaty these privileges were granted from some day early in the year 1804 to a corresponding date in 1816, and Louisiana was formally admitted as a state into the Union on April 30, 1812. For nearly four years, therefore, if the provisions of the treaty of 1803 remained in force, the ports of Louisiana enjoyed privileges in commerce with France and Spain that were not granted to the ports of any other state.

When the treaty of 1803 was before Congress, objections were made to the commercial privileges granted by the seventh article on the specific ground that these privileges were contrary to the clause of the Constitution already cited. Other interpretations were offered, but the explanation most frequently given, and apparently most acceptable, was to the effect that this clause of the Constitution referred only to the states, and as Louisiana was not a state, but a territory, that clause was not applicable in this instance.[2]

It seems scarcely possible, therefore, that, when the bill for the admission of Louisiana into the Union was before Congress in 1811, this point of conflict of the treaty with the Constitution was not raised, and yet such appears to have been the case. It is true that the debate over the admission of Louisiana was not a long one[3] and that it was several times interrupted by matters of more pressing importance, such as the re-charter of the national bank, the commercial and other complications with England, so soon to culminate in war. Yet the opposition to the admission of Louisiana was very bitter. Objections of all sorts were raised, but no one seems to have noticed the fact that by the admission of Louisiana as a state the commercial privileges of the treaty came into direct conflict with the provisions of the Federal Constitution. When one remembers the keenness with which every point in the treaty was discussed in 1803,

[1] Article VII.

[2] Cf., *e. g.*, statements by Nicholson, of Maryland; Rodney, of Delaware; Mitchill, of New York, and Elliot, of Vermont. *Annals of Cong.*, 8th Cong., 1st Sess., 471, 475, 482 and 450.

[3] In the Senate practically no debate at all is recorded and in the House the bill was only briefly debated on seven days in the course of two weeks. *Annals of Cong.*, 11th Cong., 3rd Sess., pp. 97–127, 482–579.

and the acuteness of New Englanders on all constitutional questions, and remembers also that the New Englanders were especially strong in their opposition to the admission of Louisiana, this oversight seems the more remarkable.

As careful a study of the records as time and opportunity have permitted establishes the belief that this conflict escaped the notice of every one at the time. And this belief is confirmed by the statement of John Quincy Adams in 1821, that "No question appears to have arisen at the time of the admission of the State upon the application of this article, and the privilege of French and Spanish vessels was never, in fact, denied them during the term for which they were entitled by the article to claim it."[1]

It was several years after the admission of Louisiana as a state and not until after the term of these commercial privileges had expired that our government became aware of the manner in which the Constitution had been disregarded in permitting these commercial privileges to continue. It is quite possible that these privileges were never of much moment either financially or commercially, and it is probable that the non-observance of the constitutional prohibition was due to inadvertence in time of war. But inasmuch as the Constitution was plainly disregarded, it is interesting to learn the way by which the attention of our government was called to this omission.

Shortly after the War of 1812 the United States adopted a plan of reciprocity. The discriminating tonnage duties on foreign vessels were repealed "in favour of any foreign nation, whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished."[2] England promptly availed herself of this offer,[3] and a little later the Netherlands, Sweden, Prussia and certain of the Hanseatic cities did the same,[4] but France declined or neglected to take advantage of this opportunity.[5]

It was not long before the masters of French merchant ships began to protest both to their own government and to the United States local authorities that discriminations were made against

[1] Adams to de Neuville, June 15, 1821. *Amer. State Papers, For. Rel.*, V., p. 182.

[2] *U. S. Stat. at Large*, Mar. 3, 1815, Chap. 77.

[3] *Amer. State Papers, For. Rel.*, Vol. IV., p. 7.

[4] President's Message at first Session of 17th Congress. *Ibid.*, p. 738.

[5] There were additional acts passed laying heavier tonnage duties in certain instances. These were evidently retaliatory and culminated in the Act of May 15, 1820, Chap. 126, which imposed a tonnage duty of $18 per ton on all French vessels entered in the United States.

French vessels and that they were no longer treated in the ports of Louisiana upon the footing of the most favored nation. Acting under instructions from his government, the French minister to the United States, Baron de Neuville, looked into the matter and then in 1817 lodged a formal complaint with our Secretary of State. He protested against the advantages that were granted to Great Britain in all the ports of the United States, and insisted that similar privileges should be accorded to France in the ports of Louisiana, in accordance with the eighth article of the treaty of 1803 which stipulated that "in future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favored nations in the ports above mentioned."[1] In answer to this complaint, the Secretary of State, John Quincy Adams, replied that French vessels were treated upon the footing of the most favored nation; that the English vessels enjoyed this advantage only for a full equivalent; and that it would be possible for France to obtain "every advantage enjoyed by the vessels of Great Britain upon the fair and just equivalent of reciprocity," not only in the ports of Louisiana but in those of all the United States. He further insisted that to admit French vessels into the ports of Louisiana upon the payment of the same duties as vessels of the United States would be contrary to the provision of the Constitution which declares "that no preference shall be given to the ports of one state over those of another."[2]

It was in response to this that de Neuville called attention to the fact that such privileges had been enjoyed in 1815 in spite of apparent constitutional difficulties, and asked why, if this were done in 1815, it could not be repeated now.[3]

If one were to judge simply by outward appearances, it would seem as if the dilemma were one from which our Secretary of State saw no way of escape. For although communications were frequently exchanged between the representatives of the two governments, no attempt was made to answer the questions that the French minister had propounded. It was not until two years later, after a special request from de Neuville for a reply to his letter of June 16, 1818, that Adams took up this matter. He then stated that whether the commercial privileges of the treaty of 1803 were compatible with the Constitution of the United States was a question for the Senate to decide; but that whether the claim advanced by France was reconcilable with the Constitution of the United

[1] De Neuville to Adams, December 15, 1817. *Amer. State Papers, For Rel.* Vol. V., p. 152.

[2] Adams to de Neuville, December 23, 1817. *Ibid.*, pp. 152–153.

[3] De Neuville to Adams, June 16, 1818. *Ibid.*, pp. 154–155.

States was not a question of construction or of implication. It was directly contrary to the constitutional provision that the regulations of commerce and revenue in the ports of all *states* of the Union should be the same. He further said:

"The admission of the State of Louisiana, in the year 1812, *on an equal footing with the original States* in all respects whatever, does not impair the force of this reasoning, although the admission of French and Spanish vessels into their ports for a short remnant of time upon different regulations of commerce and revenue from those prescribed in the ports of all the other States in the Union, gave them a preference not sanctioned by the Constitution, and upon which the other States might, had they thought fit, have delayed the act of admission until the expiration of the twelve years; yet as this was a condition of which the other States might waive the benefit for the sake of admitting Louisiana, sooner even than rigorous application would have required, to the full enjoyment of all the rights of American citizens, this consent of the only interested party to anticipate the maturity of the adopted child of the Union can be considered in no other light than a friendly grant in advance of that which, in the lapse of three short years, might have been claimed as of undeniable right."[1]

A few weeks later Adams added:

"Whatever transient and inadvertent departure, in favor of the inhabitants of Louisiana, from the principles of the Constitution, may have occurred, is a question of internal administration in this Government, from which France has received no wrong and of which, therefore, she can have no motive to complain."[2]

After one more retort from the French minister, this question was dropped in the negotiations for the convention which was consummated in 1822.

The whole matter is not of vital importance. France had nothing of which to complain. It might even be decided that the Constitution was not infringed. The Constitution provides that no preference shall be given by any *regulation of commerce or revenue* to the ports of one state over those of another. The act for the admission of a state can hardly be regarded as a regulation of commerce or revenue, unless it be interpreted as such because commerce is thereby affected. Or possibly Madison's explanation might be accepted: that this privilege was not the result of ordinary legislative power in Congress; that this privilege was "in the deed of cession, carved by the foreign owner out of the title conveyed to the purchaser," and that the United States never possessed entire power over that territory as over the original territory of the United States.[3] But in view of the stress that has always been laid upon

[1] Adams to de Neuville, March 29, 1821. *Ibid.*, pp. 164–165.

[2] Adams to de Neuville, June 15, 1821. *Ibid.*, p. 182.

[3] Letter to Robert Walsh, November 27, 1819. Madison's *Writings*, Vol. III. pp. 153–154.

The date of the letter renders it probable that Madison's attention was called to this difficulty by the administration after France had raised the question.

the fact that such commercial privileges in the case of Louisiana, the Floridas, and the Philippines were not granted in the ports of a *state*, and in view of Adams's frank admission that, under the circumstances, there had been a virtual suspension of a provision of the Constitution, one cannot avoid the feeling that, had the circumstances been generally known, public opinion would have regarded the continuance of the commercial privileges after Louisiana became a state as a breach of the Constitution, no matter how the difficulty might have been avoided by technical interpretation.[1] At any rate the point is of historical interest both for itself and because it apparently escaped the notice of those of the time, to whose distinct advantage it would have been to call attention to it, and also because it came up at a later date to embarrass our negotiations with France.

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[1] It would seem as if Attorney-General Griggs must have been aware of this difficulty, and thought it best not to refer to it, for in his "Argument" in the recent "Insular Cases" before the Supreme Court he cited passages from Adams's letter to de Neuville of June 15, 1821, and only a few lines farther on this constitutional objection is stated in unmistakable terms. *The Insular Cases*, Government Printing Office, Washington, 1901, pp. 339–340.